In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 266

CENTRAL-ILLINOIS SECURITIES CORP. AND CHRISTIAN A. JOHNSON

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, ET AL., THE HOME INSURANCE CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

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1. The Commission agrees that the instant petition should be granted. Petitioners herein are common stockholders of Engineers Public Service Company and are respondents in cases Nos. 226, 227, and 243 wherein the Commission and preferred stockholders of Engineers are seeking review of the judgment of the Court of Appeals for the Third Circuit entered March 19, 1948, and its judgment

denying petitions and cross-petitions for rehearings entered June 11, 1948. The petitions filed by the Commission and the preferred stockholders urged that the court below should have directed the district court to approve and enforce, in accordance with the prior approval of the Commission, the proposal in an otherwise uncontested plan under Section 11(e) of the Public Utility Holding Company Act, to pay the preferred stockholders in satisfaction of their claims amounts equal to the redemption prices. The Court of Appeals for the Third Circuit upheld the district court in its rejection of the Commission's determination, but held that the district court erred in enforcing the plan in accordance with its own view that an amount equal to the involuntary liquidation preference of $100 per share was the amount required by the fair and equitable standard of Section 11(e). The present petition raises questions which closely parallel those raised by petitioners in cases Nos. 226, 227, and 243, except that these questions are, of course, posed from the point of view of common stockholders who disagree with the Commission's determination of what is fair and equitable and seek to support the contrary views of the district court. In addition, the petition urges alternative grounds for support of the district court's decision which both courts below rejected, and argues that if the Commission does not prevail in its effort to have the plan enforced as approved by it, then the court below should be directed to affirm the decision of

the district court rather than to continue in effect the order for remand to the Commission.

2. Although we disagree with many of the arguments advanced by petitioners and with their version of the facts, we do not oppose the issuance of a writ of certiorari on their petition, for we believe the issues petitioners raise and the issues raised by the Commission's petition are interrelated and may appropriately be considered at the same time.

3. The procedural question of whether there should be a remand to the Commission if the district court is upheld in its rejection of the Commission's valuation, is interrelated with the questions as to the proper interpretation of the fair and equitable standard of Section 11(e) and as to the relative roles of Commission and district court in applying those standards.

The Commission's action granting alternative approval to a plan providing for the payment of only $100 per share to the preferred stock and, if the district court should so order, for an escrow of the amount in dispute pending the outcome of the litigation, was premised upon the assumption that the facts were not disputed or susceptible of dispute and that the courts would be confronted only with the issue of whether the involuntary liquidation preference specified in the charter or the fair investment value of the stock was, as a matter of law, the "equitable equivalent" of the rights the preferred stockholders were called upon to surrender.

Both courts below, however, have accepted the Commission's determination that under *Otis* v. *S. E. C.*, 323 U. S. 624, the preferred stockholders' liquidation preference is not "dispositive". Unless petitioner should persuade this Court otherwise, or unless this Court should agree with the district court that its weighing of colloquial equities may be substituted for the Commission's finding of equitable equivalence, we see no escape from the requirement of a remand to the Commission. Acceptance of the views of the court below that the Commission has an unfulfilled valuation function to perform and that the district court may reject the Commission's valuation without laying down a substitute standard which the Commission must follow, appears to make that result inevitable. No waiver on the Commission's part, even if its action could be so construed, could abdicate or delegate to the district court any unfulfilled valuation function vested in it by the statute. *Cf. Schwabacher* v. *United States*, 334 U. S. 182, 198.

The embarrassing and anomalous problem confronting the Commission on such a remand has been pointed out in the petition for a writ of certiorari in case No. 226. Petitioner in the present case agrees that if the decision of the court below leaves it open to the Commission to do any more on remand than accept the determination of the district court "such a ruling would imperatively call for consid-

eration and determination by this Court of the respective statutory functions of the Commission and the District Court, as well as all those fundamental issues of 'fairness and equity' under Section 11(e) which the Circuit Court held were correctly determined by the District Court" (Pet., p. 30, fn. 38).[1]

4. While we believe it premature to argue the merits of the decision below, we note briefly a few of our objections to statements by the present petitioners both in their petition in No. 266 and in their brief in opposition in Nos. 226, 227, and 243. Some of these misstatements appear also in the Boehm and White memorandum in opposition.

A. *It is stated that under today's conditions in the financial market Engineers' preferreds, if still outstanding, "would have a present market value of not more than $90-$95 per share* (R. 122-3)." (By Central Illinois in its petition, p. 30, and in its brief in opposition, Point I). The record references are to Central Illinois' own

[1] This problem would become all the more embarrassing if the present petitioner is right in its contention (brief in opposition, Point IV, p. 34) that the court below "had no intention of insisting upon the exact ascertainment and computation of each loss sustained by Engineers, but merely upon giving reasonable consideration to the fact that such losses (without necessity for precise computation) had been sustained." It is not indicated how the Commission, without reference to proof of actual losses, is to give content in terms of computing the amount of dollars payable to the preferred, to such hypothetical losses. (R. 71a-73a).

arguments, purportedly based on matters of judicial notice set forth in answer to the Commission's petition for rehearing in the court below. These assertions involve, we believe, a gross exaggeration of an admitted change in market conditions since Engineers' preferred stocks were retired under the plan. Central Illinois' highest valuation of $95 per share, if applied to Engineers' 6% preferred stock, could be supported only if securities of comparable quality were presently selling to yield 6.32% or higher. On the other hand, a yield of 5.45% or less on the same class of preferred would support, according to the Commission's approach, a finding that its investment value, if presently outstanding, is equal to the $110 per share redemption price. The Badger testimony, which was accepted by the district court (R. 290a), indicated that, except as limited by the redemption ceiling price, the preferred would sell on a 4.6% yield bases (R. 310a), i. e., in excess of $110 per share. This testimony was based on a comparison of the then current market prices for other "medium grade" preferred stocks which Badger regarded as comparable. Our own computation, based upon market prices of September 22, 1948, show an average yield at the present time of 4.82% for the securities used by Badger as a basis of his comparisons and now outstanding. Thus, even making allowance for the change in market

conditions to date, it is clear that the Commission's original conclusion that the preferred stocks have an investment value of not less than the redemption prices is still valid.[2]

In any event, we believe that the latest relevant date for computing the equitable equivalent in cash of what the preferred stockholders surrendered was the effective date of the plan when their shares were cancelled and their right to future dividends terminated. Thus, even if this Court should accept Central Illinois' exaggeration of the extent of the change in market conditions since that date, that change would not affect either the issue of whether the plan should have been enforced as approved by the Commission, or the issue of what, if any, different standards the Commission should apply if there is to be a remand. Without resolution by this Court of the questions posed in the Commission's petition, remand for the purpose of ascertaining market conditions would be dilatory, futile, and confusing. Moreover, since the court below did not rest its decision upon alleged changes in market conditions, acceptance of Central Illinois' assertions as a basis for denying a writ of certiorari would itself involve a modification of the decision below.

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[2] Central Illinois' computations appear to be based in part upon market figures as of March 26, 1948, and using only three of the securities upon which Badger based his computation.

B. On the basis of quotations out of context it is asserted, as an indisputable fact, that the Commission's decision in the instant case was a novel departure from a "long line of Commission and Court decisions", and the Commission is chided because its opinion "avoided even the slightest reference to the long and deeply-rooted decisions discussed above." (Petition in No. 266, p. 24; Central Illinois brief in opposition, p. 18; Boehm and White memorandum, p. 14.) Apart from the fact that this argument of inconsistency was rejected by both courts below in holding the liquidation preference not "dispositive", the statements give a misleading picture of Commission precedents. The Commission has consistently held that neither redemption prices nor liquidation preferences are necessarily determinative of the equitable equivalent in cash of bonds or preferred stock where the investment is forcibly surrendered under Section 11. The Commission cases on which Central Illinois relies which disallowed payment of redemption prices, while not discussed by the Commission in its *Engineers* opinion, had been fully dealt with in the earlier *American Power and Light* case which the Commission cited (R. 62a, n. 43, citing Holding Company Act Release No. 6176). Indeed, it was in recognition of previous expressions of the Commission's view that the parties to the administra-

tive proceeding offered testimony concerning the "investment value" of Engineers preferreds.[3]

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ROGER S. FOSTER,
General Counsel,
Securities and Exchange Commission.

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[3] Central Illinois' statement that in the United Light and Power debt retirement case "the debentures had been selling at *a permium above par* despite the imminence of retirement" brief in opposition, p. 16) apparently is based upon a Commission footnote which intimates that the premium of "as much as 1½ points above par" (with the issue of the debentureholders' claim for a 9 point premium undecided) was attributable to, rather than "despite", the imminence of liquidation. The footnote referred to reads as follows:

> All the debentures were originally sold to the public during the years 1923 to 1925 at prices ranging between 90 and 95. From 1931 to 1940 market quotations were constantly below par reaching as low as 25 for a time in 1933. Since 1940 and especially since our order of March 20, 1941, for the liquidation and dissolution of Power, market quotations have been close to and sometimes as much as 1½ points above par. [10 S. E. C. 1227, n. 27.]

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